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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-258
Indecent Programing and Other Types of Materials on Cable Access Channels	)	

COMMENTS OF TELE-COMMUNICATIONS INC.

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December 7, 1992

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SUMMARY

There is a fundamental internal inconsistency in the schemes for leased and PEG access, particularly as amended by the 1992 Act. On the one hand, Congress prevents cable operators from exercising control over leased and PEG access channels. On the other hand, Congress imposes liability on operators for certain programming carried on those channels. As a result, the Commission should afford cable operators flexibility to comply with the Act in a manner that protects them from liability while, at the same time, satisfies Congressional objectives. Specifically, the Commission should promulgate rules which, among other things:

- o permit cable operators to establish and enforce a policy of not carrying indecent leased access programming;
- o require access programmers in all circumstances to certify their programming is not obscene or indecent;
- o hold cable operators harmless for carriage of indecent programming if the leased access programmer gives notice that its programming is not indecent or does not give notice at all; and
- o adopt a flexible rule for blocking that allows cable operators to utilize any reasonable form of blocking.

TCI believes such rules would fully comport with Congressional intent and would best serve the public interest.

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), hereby files its comments in the above-captioned proceeding.[1] TCI is a multiple systems operator providing cable service in 48 different states to more than nine million subscribers. TCI is thus an interested party to this proceeding.

I. INTRODUCTION

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") requires the Commission to promulgate regulations that: (1) restrict access by children to indecent programming on cable leased access channels; and (2) enable cable operators to prohibit use of public, educational, or government ("PEG") access channels for programming which contains

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[1] Notice of Proposed Rulemaking in MM Docket No. 92-258, FCC 92-498 (rel. Nov. 10, 1992) ("Notice").

obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

As an initial matter, TCI believes that leased access and PEG access violate cable operators' First Amendment rights by forcing operators to carry programming they might not otherwise carry and, in fact, may find objectionable.[2]

The courts have held that cable operators are engaged in speech protected by the First Amendment.[3] It is well-established that the First Amendment does not permit the government to mandate that speakers serve as a conduit for someone else's speech.[4]

In addition, adopting a standard of indecency that mirrors the standards applicable to broadcast programming and telephony would be inconsistent with the very different nature of cable

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[2] Leased and PEG access, among other provisions of the Communications Act and the 1992 Act amendments, are currently the subject of a constitutional challenge in Time Warner Entertainment Company L.P. v. Federal Communications Commission, Civil Action No. 92-2494 (D.D.C. Filed Nov. 5, 1992).

[3] See Quincy Communications Corp. v. Federal Communications Commission, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); Century Communications Corp. v. Federal Communications Commission, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988); Cox Cable Communications, Inc. v. United States, 774 F. Supp. 633 (M.D. Ga. 1991).

[4] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating right of access to newspapers); Midwest Video v. Federal Communications Committee, 571 F.2d 1025 (8th Cir. 1978) (invalidating the Commission's mandatory access requirements, noting cable is not a common carrier); Century Communications Corp v. Federal Communications Commission, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988) (invalidating mandatory carriage of broadcast signals by cable operators).

technology and programming. The courts have repeatedly recognized that, unlike broadcasting, cable permits consumers to exercise several levels of control over their program selection and viewing.[5] For example, cable subscribers must affirmatively elect to have cable service brought into their homes; cable subscribers can request a lockbox from the cable operator to block any channel; and, if cable subscribers are dissatisfied, they can cancel their subscription at any time. Similarly, cable programming is unlike telephony because it is not a necessity.

Notwithstanding its strong view that leased and PEG access are unconstitutional, TCI offers the following comments because its systems will be directly and significantly burdened by Commission rules issued to implement Section 10.

In addition to the inherent constitutional problem, there is a fundamental internal inconsistency in the schemes for leased access and PEG access, particularly as amended by the 1992 Act. On the one hand, Congress prevents cable operators from exercising control over the content of leased and PEG access channels. 47 U.S.C. §§ 531(e) and 532(c)(2). On the other hand, Congress imposes on operators criminal, as well as civil liability for certain programming carried on those channels. 47 U.S.C. § 558.

In light of this inconsistency, the FCC should have two

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[5] See Jones v. Wilkinson, 800 F.2d 989, 991 (10th Cir. 1986), affd., 480 U.S. 926 (1987); Cruz v. Ferre, 755 F.2d 1415, 1419-22 (11th Cir. 1985).

principal goals in this proceeding: 1) to state clearly that cable operators are not liable for carriage of leased and PEG access programming except in very limited circumstances; and 2) to afford cable operators flexibility to comply with the Act in a manner that protects them from liability while, at the same time, satisfies Congressional objectives. Failure to achieve these goals would impose an extraordinarily unfair and serious burden on cable operators.

II. CABLE OPERATORS HAVE NO LIABILITY FOR LEASED OR PEG ACCESS CHANNELS THAT ARE NOT OBSCENE

The Act makes clear that cable operators have no civil or criminal liability for carriage of sexually explicit, but non-obscene programming on leased access channels or PEG access channels. In addressing cable operators' liability "pursuant to Federal, State, or local law of ... obscenity ... or other similar laws," 47 U.S.C. § 558, as amended by the 1992 Act, states that cable operators "shall not incur any such liability for any program carried on" leased access or PEG access channels "unless the program involves obscene material."

Thus, Congress intended that cable operators would not be liable for "indecent" or other non-obscene, but sexually explicit programming carried on leased and PEG access channels. In the Notice, the Commission states that "if a program is obscene, a cable operator is no longer statutorily immune from liability for

programs carried on the PEG or leased access channels of its system." Notice at para. 2. It also should state that cable operators are not liable for non-obscene material carried on leased or PEG access channels.

Cable operators are, of course, required to comply with Commission rules under Section 10 regarding carriage of indecent leased access programming. As discussed below, operators should only be in violation of Section 10 in the limited and unlikely circumstance that they have knowledge that leased access programming is indecent and they fail to isolate and block that programming.

III. CABLE OPERATORS SHOULD HAVE FLEXIBILITY TO COMPLY WITH THE ACT'S REQUIREMENTS

Leased access programming involves a commercial transaction in which cable operators and programmers, after give-and-take negotiations, enter into a contract for carriage. In developing rules to implement Section 10, the Commission should avoid restricting the ability of operators or programmers to freely negotiate the terms and conditions of carriage. Specifically, the issue of who bears the costs of compliance with Section 10, as implemented by Commission regulations, should be a matter resolved in the arms-length negotiations between operators and programmers over the terms and conditions of carriage.

Section 10 of the Act requires the Commission to promulgate

rules requiring cable operators to undertake steps regarding indecent leased access programming. These steps involve, among other things, isolating such programming on a single channel and blocking that channel unless requested in writing by the subscriber. As discussed below, these steps threaten to impose upon cable operators substantial technical, operational and marketing complexities, and significant costs. As a result of the serious potential impact of this provision, the Commission should provide cable operators with flexibility to comply in any reasonable manner consistent with Congressional goals.

A. The Act Allows Cable Operators to Exclude Indecent Leased Access Programs and to Require Access Programmers to Certify Their Programming Is Not Obscene or Indecent

Section 10(a)(2) of the Act allows cable operators to "enforce prospectively a written and published policy of prohibiting [on leased access channels] programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." As the Commission indicates in the Notice, this provision is self-executing and becomes effective on December 4, 1992.

Neither the Act nor the legislative history specify a particular form of notice or method of publication for the

policy. The Commission should interpret this absence of specificity, reflecting Congress' intention to afford cable operators discretion to establish the form and the manner of publication of the policy permitted under this section.

In order to enforce a policy of prohibiting indecent leased access material, cable operators must have a reasonable method of knowing whether particular programming is indecent. In the Notice, the Commission inquires whether permitting cable operators to require programmers to certify that their programming is not indecent would violate 47 U.S.C. § 532(c)(2) which prohibits operators from exercising editorial control over leased access programming. As explained below, TCI believes certification would not violate that provision and is an appropriate method for cable operators to obtain notice of whether programming is indecent.

Certification can be achieved in a straightforward, non-intrusive manner. Cable operators could simply require certification as part of the contract programmers enter into for carriage of leased access programming. Thus, certification need not involve the cable operator in the content of the programming.

In the Notice, the Commission assumes cable operators can require certification if they have a written and published policy of prohibiting indecent material. Notice at para. 11. Because certification would not significantly burden programmers or interfere in any way with the content of their programming, TCI agrees that it should be available to enable the cable

operator to enforce a policy of prohibiting indecent leased access programming.

The Commission also assumes cable operators could require access programmers to certify that their programming is not obscene. In light of the potential for criminal and civil liability for carriage of obscene material, cable operators must be allowed to require certification, or any other reasonable form of notification, as a way to ascertain whether leased or PEG access programming is obscene.

In addition, as discussed below, TCI believes certification should be available more broadly for cable operators to satisfy their leased and PEG access obligations.

B. Cable Operators May Require Leased Access Programmers To Certify Their Programming Is Not Indecent

Even where a cable operator does not have a policy of prohibiting indecent programming on leased access channels, it must be able to effectively obtain notification that leased access programming is indecent if it is to comply with the Act's requirements to isolate and block such programming.

The Act imposes on programmers the obligation "to inform cable operators if the program would be indecent." 47 U.S.C. § 532(j)(1)(C). Cable operators have no independent obligation to determine whether particular programming meets the Commission's

definition of indecency. Indeed, it would be extraordinarily costly and time-consuming to require operators to pre-screen all access programming and the Act does not require pre-screening. The Commission's Notice reflects Congress' clear mandate to place the burden of notice on the programmer: "it is the program provider, not the cable operator, who must determine if a program is indecent and, hence, must be provided on the blocked channel." Notice at para. 10. TCI supports this view.

As discussed above, cable operators could effectively obtain notice to enable them to comply with Section 10 by requiring leased access programmers to certify that their programming is not indecent. TCI has demonstrated that certification would place no significant burden on access programmers. The Commission assumes in the Notice (at para. 11) that certification does not run afoul of the provision on editorial control in cases where a cable operator has a written and published policy of refusing to carry indecent leased access programming. There is no reason to believe certification violates that provision in other circumstances. Therefore, TCI believes certification should be an option for obtaining notice in all leased and PEG access situations.

C. Cable Operators Are Not Liable For Carriage If A Leased Access Programmer Gives Notice That Its Program Is Not Indecent

In cases where a leased access programmer notifies a cable operator that its programming is indecent and the operator appropriately isolates and blocks such programming, Section 10 will have been satisfied and there is no liability for such carriage. Also, as noted, 47 U.S.C. § 558 clarifies that cable operators are not liable for carriage of non-obscene leased or PEG access programming.

Similarly, if an access programmer certifies in writing that its programming is not obscene or indecent, there should be an irrebuttable presumption that the cable operator has no knowledge that the programming falls into those categories. Therefore, the operator is not liable for carriage of such programming. In the Notice, the Commission states that "the cable operator has no power to require that indecent programming be carried on the blocked channel if the program provider does not identify the program as indecent and so inform the cable operator." Notice at para. 10. In effect, according to the Commission, the cable operator has no knowledge of indecent programming in the absence of programmer notification. It follows, a fortiori, that a cable operator has no knowledge of obscene or indecent material if the programmer affirmatively certifies in writing that its programming contains no such material. Absent knowledge that

the programming is indecent, it is untenable to hold the operator liable for carriage.[6]

This interpretation is consistent with the purpose and language of the section. By imposing on programmers the obligation to notify cable operators if their programming is indecent, Congress in 47 U.S.C. § 532(j)(1)(C) clearly removed from cable operators an obligation to make independent judgments about such programming. To impute knowledge to cable operators that such programming is indecent in the face of a programmer's certification will force operators to make independent judgments about the programming or potentially violate the Act by failing to isolate and block the programming. Such a reading renders 47 U.S.C. § 532(j)(1)(C) meaningless.[7]

Similarly, there should be an irrebuttable presumption that the cable operator has no knowledge if it does not receive any notice from a programmer that access material is obscene or indecent. Again, the Act under 47 U.S.C. § 532(j)(1)(C) imposes the obligation to identify programming as indecent squarely on the programmer. Cable operators may reasonably expect that programmers will comply with their notification obligation. Therefore, if a programmer does not notify a cable operator that

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[6] A statute or ordinance which, without requiring scienter, makes it a criminal offense to possess or distribute obscene materials, is invalid as a matter of federal constitutional law. Smith v. California, 361 U.S. 147, 153-55 (1959).

[7] It is a settled principle of statutory construction that every section, phrase and word of a statute, if possible, must be given effect. See Bowsher v. Merck & Co., 460 U.S. 824, 833 (1983).

its programming is obscene or indecent, the operator may assume the programming does not fall into those categories. Under such circumstances, there should be an irrebuttable presumption that the operator does not have knowledge that the program is obscene or indecent and, therefore, is not liable for carriage.

Finally, cable operators should be able to utilize mechanisms to protect themselves from liability that are common in commercial transactions. For example, cable operators should be able to require programmers to indemnify them for liability or to obtain liability insurance. These mechanisms are used commonly in transactions between operators and programmers and should be available in the access programming context as well.

D. The Wide Variety of Cable System Technical Configurations Necessitates Flexibility In The Manner of Blocking Indecent Leased Access Channels

The Act requires cable operators to block indecent leased access channels unless the subscriber requests such channel in writing. Neither the Act nor the legislative history specify a required method of blocking. Cable operators use a number of methods to block subscriber access to a channel. The Commission must ensure that cable operators retain the flexibility to use any reasonable method of blocking subscriber access that satisfies the goals of Section 10. Generally, these methods fall into two categories, scrambling and interdiction:

1) Scrambling--scrambling is a process of reconstituting the signal to reduce its utility to the point where subscribers will not want to watch it. Although there are numerous methods of scrambling, the two most popular are video inversion and sync suppression.

Video inversion is a process of converting parts of a video signal that are normally white into black, parts that are normally black into white, and similarly moving around the colors. The result is a picture that resembles a negative. Video inversion is often used in conjunction with sync suppression. Sync suppression removes or attenuates the horizontal and/or the vertical stabilization of the picture. The result is a picture that rolls horizontally or vertically.

2) Interdiction--interdiction involves placing a blocking oscillator outside the subscriber's home that causes a wavy pattern on the television screen and could under certain circumstances cause the screen to go blank. The principal form of interdiction is trapping. There are two types of traps. Negative traps are devices which the cable operator places on the pole or, in underground systems, on the pedestal outside the subscriber's house. The trap literally blocks the channel from passing into the subscribers home or television set. Although negative traps can be an effective method of blocking access to a channel, installing them is labor intensive and costly because the cable operator must send an installer to every home that needs a trap.

Positive traps are a form of interdiction that involves inserting a jamming carrier at the headend of a cable system between the video and audio carrier of a signal. This significantly degrades the picture quality and causes a repetitive beep in the audio. Subscribers need a device that is attached to the television set to descramble the signal.

Lockboxes are another form of interdiction. Since 1984, cable operators have been required to provide lockboxes to requesting subscribers. See 47 U.S.C. § 544(d)(2)(A). In the Notice (para. 9), the Commission inquires whether, in light of the 1992 Act, cable operators should still be required to provide lockboxes. There appears to be nothing in the Act that would eliminate that requirement. The Commission should also conclude that lockboxes are an option for blocking indecent leased access channels in satisfaction of the cable operator's obligation under 47 U.S.C. § 532(j)(1)(B). TCI is not aware of any significant problems with lockboxes. To the contrary, lockboxes give subscribers another method of controlling their program viewing, a clear goal of Section 10 of the Act. Thus, lockboxes, pursuant to the requirements of 47 U.S.C. § 544(d)(2)(A), should be an appropriate method of satisfying a cable operator's obligation to block indecent leased access channels.

The purpose of Section 10 is to block subscriber access to indecent leased access programming unless requested by the subscriber. Where a cable system has the capability to block the channel only during times when the indecent programming is being

carried, there are compelling reasons to conclude that doing so should be an option for complying with Section 10. Failure to adopt this interpretation would harm consumers by reducing the amount of programming they now receive. In most TCI cable systems, channels are fully dedicated to existing program services. If a request to distribute indecent leased access programming is made, the operator has three options. First, it could drop an existing program service, thus freeing a channel for the indecent leased access program. This would diminish program choice to the detriment of consumers. Second, if a leased access channel is already in use, it could block the entire channel for all subscribers except those who request the channel in writing. This would harm existing non-indecent leased access programmers as well as reduce program diversity to consumers. Third, if feasible, it could carry the indecent leased access program and block the channel only during the time such program is carried. This option would fully satisfy the purpose of Section 10 without the negative impact on consumers and leased access programmers.

From a public policy standpoint, it makes sense to allow cable operators to comply with Section 10 by blocking the channel only when indecent programming is carried, if they have the capability to do so. This interpretation is not inconsistent with the language of Section 10. Section 10 does not, by its terms, compel cable operators to block the channel at all times. The Commission, therefore, has flexibility to permit partial

blocking. To do so would be consistent with the underlying purpose of Section 10 to permit subscribers to block access to indecent programming and the strong public policy reasons to avoid blocking the entire channel.

Blocking channels involves complex technical issues and potentially very significant costs. Cable systems in the United States vary significantly in their technical configurations. A method of blocking that works for one system will not necessarily be optimal for another system. It would be imprudent for the Commission to mandate a certain type of blocking. Rather, the Commission should permit cable operators to use any reasonable method of blocking indecent leased access channels that satisfies the goals of the Act.

E. The Commission Should Permit Cable Operators Flexibility to Notify Subscribers

In light of the lack of explicit direction of Congress and the numerous ways of notification currently used, the Commission should adopt a rule permitting cable operators to use any reasonable method to notify subscribers about the new blocked channel and how subscribers may request the blocked channel. Each cable operator is in the best position to know which method works best with its subscribers.

F. The Single Channel Requirement Does Not Obligate Cable Operators To Set Aside a Channel In Advance of a Request To Carry Indecent Leased Access Programming

Section 10 (j)(1) of the Act requires the Commission to promulgate a regulation "requiring cable operators to place on a single channel all indecent programs." There is nothing in the Act or the legislative history to suggest that Congress intended to require cable operators to set aside a channel in advance of any request for carriage of such programming. Indeed, to do so would not only be unnecessary, but contrary to the public interest. As noted, most TCI cable systems are at full channel capacity. To require them to dedicate a channel for indecent leased access programming prior to a request for carriage could result in dropping an existing program service or delaying or preventing addition of a new service. Congress clearly did not intend, and the Commission should not interpret, Section 10 to reduce the amount of programming available to consumers.

In cases where a cable operator does not already have a channel isolated and blocked, it must have a reasonable amount of time to comply with a request for carriage from the first indecent leased access program. The cable operator will need time to, among other things, obtain and install the equipment necessary for blocking, notify subscribers and, perhaps, notify local franchise authorities. Since the time to accomplish these and other tasks will vary from system to system, the Commission

should permit cable operators a reasonable time that does not unduly delay carriage of the programming.

IV. THE COMMISSION DOES NOT NEED TO PROMULGATE RULES CONCERNING DISPUTES

In the Notice, the Commission inquires whether specific procedures should be developed to govern disputes between cable operators and programmers. The Commission proposes that any disputes should be handled at the local level.

TCI believes the Commission's rules should be self-executing. If a programmer notifies a cable operator that its programming is indecent, the operator may refuse carriage (if it has a policy pursuant to Section 10(a)) or carry the program on a blocked channel. The cable operator's decision in this regard should be final.

Where a programmer notifies a cable operator that its program is not indecent, but the operator believes the program is indecent, the operator also should have the right to refuse carriage or carry the program on a blocked channel. In this case as well, the operator's decision should be final.

If a leased access programmer that has a contract for carriage has certified that its program is not indecent, and breaches that commitment, then the cable operator should have the full range of remedies available, including voiding the contract and discontinuing carriage. Here, again, no new FCC regulations

regarding disputes are necessary because both parties have the normal ability to pursue their rights under the contract.

V. CONCLUSION

Notwithstanding its objection to leased and PEG access on constitutional grounds, TCI recommends the Commission adopt rules to implement Section 10 of the 1992 Act consistent with the comments herein. TCI has appended recommended rules to implement Section 10 and respectfully submits them for Commission adoption.

Respectfully submitted,

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Appendix

Proposed Rules for Indecent Programming on Access Channels

Insert new Subpart _ to Part 76:

76.__. A cable operator may adopt and enforce a written, published policy of prohibiting, on any channel leased pursuant to Section 612, programming which is indecent or obscene.

76.__. A cable operator that does not have a policy prohibiting certain leased access programming as provided in section 76.__ must transmit all leased access programming which has been certified by its programmer as indecent on a single leased access channel. The channel used to carry indecent programming must be blocked during any period in which such programming is being transmitted unless the subscriber requests the cable operator in writing to provide access to such channel.

76.__. A cable operator may prohibit on any public, educational or governmental access channel programming which contains obscene material, sexually explicit conduct or material soliciting or promoting unlawful conduct.

76.__. In fulfilling its obligations under this Subpart a cable operator may require programmers who use a leased access channel pursuant to Section 612 to certify in writing that their programming is not obscene or indecent. In the case of programmers who use public, educational or governmental channels pursuant to Section 611, a cable operator may, in addition, require programmers to certify that their programming does not contain sexually explicit conduct or material soliciting or promoting unlawful conduct.

76.__. A cable operator shall be under no obligation to review leased access or public, educational, or governmental access programming. In cases where a programmer certifies that its leased access programming is not obscene or indecent, there shall be an irrebuttable presumption that the cable operator has no knowledge that the programming is obscene or indecent and therefore is not liable under the Act, or federal, state or local law for carriage of such programming. In cases where a programmer certifies that its public, educational, or governmental programming does not contain obscene material, or material soliciting or promoting unlawful conduct, there shall be an irrebuttable presumption that the cable operator has no knowledge that the programming contains such material and therefore is not liable under the Act, or federal, state, or local law for carriage of such programming.

76.__. In cases where leased access programmers fail to certify that their programming is not obscene or indecent, and public, educational, or governmental access programmers fail to certify that their programming contains no material which is obscene, sexually explicit or solicits or promotes unlawful conduct, a cable operator is free to treat such programming as if it does not fall into such categories or contain such material and therefore is not liable under the Act, or federal, state, or local law for carriage of such programming.

76.__. A cable operator may establish reasonable procedures which are intended in good faith to carry out the provisions of this Subpart. Any form of blocking which is customarily accepted under industry standards (including but not limited to scrambling, interdiction using negative traps, positive traps, or lockboxes) may be deployed to block access to the indecent access channel.

76.__. A cable operator that knowingly and wilfully transmits indecent leased access programming on a channel other than that designated and blocked pursuant to Subpart 76.__, or that knowingly and willfully transmits obscene leased or public, educational, or governmental access programming shall be subject to the fines and penalties of the Act.